



June 26, 2007

Delivered Via Electronic Mail

Alabama Environmental Management Commission
1400 Coliseum Boulevard
Montgomery, Alabama 36110

Re: Petition to Lower Cancer Risk Level for 58 Carcinogens in Surface Waters

Dear Commissioners:

At the June 1, 2007 meeting of the EMC Rulemaking Committee, the Committee resolved to recommend to the full Commission that the proposed cancer risk level revision be referred to a select committee to review the economic impacts of the revision on Alabama industries. However, the statutes which govern ADEM and the AEMC do not authorize the consideration of economic factors in establishing water quality criteria. Therefore, referral to a select committee would not produce information that can be lawfully considered.

Alabama Water Pollution Control Act and Alabama Environmental Management Act

“The legislature expressly stated that the public policy of this state and the purpose of the Alabama Water Pollution Control Act is ‘to conserve the waters of the state and to protect, maintain and improve the quality thereof...’” *Marshall Durbin and Company of Jasper, Inc. v. Env’tl. Mgmt. Comm’n*, 519 So.2d 962, 964-65 (Ala. Civ. App. 1987) (per curiam) (citing Ala. Code § 22-22-2). “The Alabama Legislature has imposed a statutory duty on ADEM to strive to maintain and *improve* the quality of our water in the interest of public health and welfare.” *Sierra Club v. Alabama Env’tl. Mgmt. Comm’n*, 627 So.2d 923, 926 (Ala. Civ. App. 1992) (emphasis in original). Water quality criteria are intended to protect the designated uses of waters (*e.g.*, Fish and Wildlife or Public Water Supply). “They are not a device to insure the lowest common denominator of water quality, but to encourage prudent use of the State’s water resources and to enhance their quality and productivity commensurate with the stated purpose of [Ala. Code § 22-22-2].” ADEM Admin. Code R. 335-6-10-.01(2).

The express authority of ADEM and the AEMC is to “establish standards of quality for any waters in relation to their reasonable and necessary use” consistent with the purpose of the Alabama Water Pollution Control Act. Ala. Code § 22-22-9(f). The Act contains no express authorization to consider the economic burdens on dischargers in the establishment of water quality criteria.

In addition, the Legislature declared in the Alabama Environmental Management Act as follows:

The Legislature finds the resources of the state must be managed in a manner compatible with the *environment*, and the *health* and *welfare* of the *citizens* of the state. To respond to the needs of its *environment* and *citizens*, the state must have a comprehensive and coordinated program of *environmental* management. It is therefore the intent of the Legislature to improve the ability of the state to respond in an efficient, comprehensive and coordinated manner to *environmental* problems, and thereby assure for all *citizens* of the state a *safe, healthful* and *productive environment*.

Ala. Code § 22-22A-2 (emphasis added).¹ Notably, the Legislature omitted any mention of managing the resources of the state in a manner compatible with industrial development and profits. Nor did the Legislature mention the need for a program of environmental management to respond to the needs of industries. Nor did the Legislature express an intent to improve the ability of the state to respond to environmental problems and thereby assure for all industries economic prosperity.

In *Jefferson County v. Alabama Criminal Justice Information Center Comm’n*, 620 So.2d 651 (Ala.1993), Jefferson County challenged a rule adopted by the Commission requiring users of its computer system to pay a fee. The Alabama Supreme Court held that the Commission’s enabling statute did not authorize the Commission to adopt such a rule. The Court said:

We note that the enabling legislation contains *no* express authority for the ACJIC to charge user agencies for access to the system. The trial court concluded that the terms of § 41-9-594 imply the authority to impose a user fee. We disagree. Our review of the ACJIC enabling legislation fails to disclose any provision from which an implied power to assess a user fee could be derived. The rulemaking powers found in § 41-9-594 cannot be read so as to make cities and counties financially responsible for funding the ACJIC. While § 41-9-594 does give a general grant of power to the ACJIC to “establish its own rules, regulations and policies for the performance of the responsibilities charged to it in this article,” that general grant of power is followed by an enumeration of particular classes of responsibility and authority. The broad statement of authority in § 41-9-594 is followed by a directive to the ACJIC Commission to ensure that use of the “data available through [the ACJIC] system” is restricted to “properly authorized persons and agencies.” There is no mention of user fees or service charges.

* * *

¹ The Legislature also declared its intent “to retain for the state, within the constraints of appropriate federal law, the control over its . . . water resources . . .” Ala. Code § 22-22A-2(2). As discussed *infra*, the Clean Water Act requires that states adopt water quality standards without regard to economic considerations. If ADEM and the AEMC fail to adhere to the requirements of the Clean Water Act, the state will yield control over its water resources to EPA.

It is settled law in Alabama that an administrative agency is purely a creature of the legislature and has *only* those powers conferred upon it by the legislature. *Ethics Commission of the State of Alabama v. Deutchsh*, 494 So.2d 606 (Ala.1986); *Ex parte City of Florence*, 417 So.2d 191 (Ala. 1982). The legislature expressly imposed the ACJIC funding obligation upon the State. § 41-9-599. The ACJIC cannot claim implied powers that exceed and/or conflict with those express powers contained in its enabling legislation. Every rule of statutory construction compels the conclusion that the enabling legislation confers *no* power upon the ACJIC to charge local government users of the data base. Therefore, we reject the trial court's holding that the ACJIC has implied power beyond that conferred by the legislature.

Id. at 658.

In *Ex Parte Crestwood Hospital and Nursing Home*, 670 So.2d 45 (Ala. 1995), the Court said:

“It is axiomatic that administrative rules and regulations must be consistent with the constitutional or statutory authority by which their promulgation is authorized. See C. Sands, *Sutherland Statutory Construction* § 31.02 (4th ed. 1973): “A regulation ... which operates to create a rule out of harmony with the statute, is a mere nullity.” *Lynch v. Tilden Produce Co.*, 265 U.S. 315, 44 S.Ct. 488, 68 L.Ed. 1034 (1924). This is because an administrative board or agency is purely a creature of the legislature, and has only those powers conferred upon it by its creator. *Woodruff v. Beeland*, 220 Ala. 652, 127 So. 235 (1930).”

Ex parte City of Florence, 417 So.2d 191, 193-94 (Ala.1982). An administrative agency cannot usurp legislative powers or contravene a statute. *Alabama State Milk Control Board v. Graham*, 250 Ala. 49, 33 So.2d 11, 14 (1947).

Id. at 47.

The Legislature did not expressly authorize ADEM or the AEMC to consider the economic burdens on dischargers in establishing water quality criteria. A general grant of rulemaking powers is not sufficient to imply such authority. Absent authority from the Legislature, ADEM and the AEMC may not consider such economic factors in establishing water quality criteria. To do so would be an unconstitutional usurpation of the power of the Legislature to define or modify the permissible considerations for establishing water quality criteria. Accordingly, referral of the proposed rule revision to a select committee to investigate potential economic consequences on dischargers would not produce information that can be lawfully considered by ADEM or the AEMC.

Alabama Administrative Procedure Act

The Alabama Administrative Procedures Act is intended to “provide a minimum procedural code for the operation of all state agencies when they take action affecting the rights and duties of the public.” Ala. Code § 41-22-2(a). The Act “is not meant to alter the substantive rights of any person or agency. Its impact is limited to procedural rights with the expectation that better substantive results will be achieved in the everyday conduct of state government by improving the process by which those results are attained.” Ala. Code § 41-22-2(2)(c).

Ala. Code § 41-22-23(f) instructs agencies² adopting rules with an economic impact to prepare and submit to the Joint Committee on Administrative Regulation Review a fiscal note. This procedural requirement does not alter the mandates of the Alabama Water Pollution Control Act or Alabama Environmental Management Act and does not authorize ADEM or the AEMC to consider economic factors in the establishment of water quality criteria. The fiscal note is strictly a procedural device to facilitate the deliberations of the Joint Committee on Administrative Regulation Review.

Thus, the Alabama Administrative Procedure Act does not authorize ADEM or the AEMC to consider the economic burdens on dischargers when revising water quality criteria.

Clean Water Act

The objective of the Clean Water Act “is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” The Act establishes an interim goal of water quality which “provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water . . .” 33 U.S.C. § 1251. The Act also identifies permissible considerations for state adoption of water quality criteria.

Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. *Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.*

33 U.S.C. § 1313(c)(2)(A) (emphasis added). All state-adopted water quality standards must adhere to the requirements of 33 U.S.C. § 1313(c)(2)(A) and be reviewed and approved by EPA. To receive

² The Director suggested to the EMC Rulemaking Committee that the Alabama Administrative Procedure Act obliges the Petitioners to provide information on economic impacts. The Act states that the fiscal note discussing economic impacts of a rule shall be “prepared by the agency.” Ala. Code § 41-22-23(f).

approval by EPA, state-adopted standards must be “consistent” with the requirements of the Clean Water Act.

In *Whitman v. American Trucking Ass’n, Inc.*, 531 U.S. 457, 465-471 (2001), the United States Supreme Court acknowledged that Section 109(b)(1) of the Clean Air Act instructs the EPA to set primary ambient air quality standards “the attainment and maintenance of which . . . are requisite to protect the public health” with “an adequate margin of safety.” 42 U.S.C. § 7409(b)(1). The Court held that, absent a textual commitment of authority to the EPA to consider costs in setting ambient air quality standards, the Act must be construed to unambiguously bar cost considerations from the standards-setting process. *See also Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“Agency action is considered arbitrary or capricious if the agency has relied on factors which Congress has not intended it to consider . . .”). Like the Clean Air Act, the Clean Water Act does not include a textual commitment of authority to the EPA or the states to consider costs. Thus, the Clean Water Act does not authorize the consideration of economic factors in the establishment of water quality criteria.

In *Homestake Mining Co. v. U.S. Env’tl. Protection Agency*, 477 F. Supp. 1279, 1284 (D. S.D. 1979), plaintiff challenged the EPA’s approval of South Dakota’s water quality standards because the state adopted such standards without giving consideration to economic and social factors. The court held that states are not required to consider economic and social factors in establishing water quality standards and EPA has no authority to disapprove such standards on that basis. *See also City of Albuquerque v. Browner*, 865 F.2d 733, 741 (D. N.M. 1993), *aff’d* 97 F.3d 415 (10th Cir. 1996) (EPA lacks the authority to reject stringent standards on the grounds of harsh economic or social effects).

EPA regulations authorize states to consider economic impacts in narrowly prescribed situations.³ Most important among these for purposes of this discussion however, is that a state is authorized to grant (with EPA review and approval) temporary variances from state water quality criteria to individual dischargers if meeting the criteria “would cause substantial and widespread economic or social impact.” 40 C.F.R. § 131.13; 48 Fed. Reg. 51403 (1983). Applications for variances would normally be considered at the time of permit issuance, reissuance, or modification. Thus, if there are specific industries that would unduly suffer if the revised cancer risk level is adopted, they may apply for a temporary variance from the criteria.

³ For example, a state is authorized to remove a designated use of a water that is not an existing use if “[c]ontrols more stringent than those required by sections 301(b) and 306 of the Act would result in substantial and widespread economic and social impact.” 40 C.F.R. § 131.10(g)(6). A state is authorized to allow a lowering of water quality in high quality waters if it is necessary to accommodate important economic or social development in the area in which the waters are located. 40 C.F.R. § 131.12(a)(2). A state is authorized to grant a variance from “best available technology economically achievable” effluent limitations if achieving such limitations is not within the economic capability of the discharger. 33 U.S.C. § 1311(c). In establishing “best available technology economically achievable” effluent limitations for a discharger where EPA has not promulgated such limitations, the state is authorized to consider “[t]he cost of achieving such effluent reduction.” 40 C.F.R. § 125.3(d)(3)(v).

Thus, the Clean Water Act does not authorize ADEM or the AEMC to consider economic factors in establishing water quality criteria.

Conclusion

The statutes which govern ADEM and the AEMC do not authorize the consideration of economic factors in establishing water quality criteria. Therefore, referral of the proposed revision of the cancer risk level to a select committee to investigate the economic impacts on dischargers of carcinogens would not produce information that can be lawfully considered by the AEMC.

Sincerely,

A handwritten signature in cursive script, appearing to read "David A. Ludder".

David A. Ludder
Attorney for Petitioners

cc: EMC Members
Onis "Trey" Glenn, ADEM Director
Robert Tambling, Assistant Attorney General